No. _____

Supreme Court, U.S.
FILED

981192 JAN 22 1999

CLERK

In The Supreme Court Of The United States

OCTOBER TERM, 1998

JOSEPH ORLANDI, DEBORAH A. ORLANDI SIGNORELLI, KAREN ORLANDI PATERNO, MICHAEL E. ORLANDI and JOSEPH ORLANDI,
Petitioners,

vs.

CHARLES MILLER, Commissioner of West Virginia Department of Highways and the West Virginia Turnpike Commission,
Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE WEST VIRGINIA SUPREME COURT

PETITION FOR WRIT OF CERTIORARI

Arthur T. Ciccarello
CICCARELLO, DEL GUIDICE & LaFON
Suite 100
1219 Virginia Street, East
Charleston, West Virginia 25301
(304) 343-4440

Counsel for Petitioners

LAWYERS PRINTING COMPANY 7th & Franklin Bldg. Richmond, Virginia 23219 (804) 648-3664

9098

QUESTIONS PRESENTED

Whether the West Virginia Supreme Court's refusal to reverse a lower Court's ruling denying the Petitioner's demand for condemnation proceedings has the effect of the State of West Virginia (through the West Virginia Department of Highways and the West Virginia Turnpike Commission) taking property of the Petitioner's without just compensation and without due process of law as required by the United States Constitution Amendment V and the West Virginia Constitution, Article 3, Section 9.

PARTIES TO THE PROCEEDINGS

All are listed in case caption.

TABLE OF CONTENTS

Page

Questions Presented for Review.....(i)

Parties to the Proceedings .....(i)

Table of Contents .....(ii)

Table of Authorities.....(iii)

Opinions Below 1

Jurisdiction 2

Constitutional Provisions in Question.2

Statement of the Case 3

I. The Proceedings and Nature Of Rulings In The Circuit Court of Kanawha County and the West Virginia Supreme Court.....3

II. Statement Of The Case And The Facts.....9

Reasons for Granting the Writ 17

Discussion 17

Conclusion 22

TABLE OF AUTHORITIES

Page

CASE CITATIONS

Griggs v. Graney, State Road Commission,143 W.Va. 610 (103 S.E.2d 878).....21

State ex rel. French v. State Road Commission, 147 W.Va. 619, S.E.2d 831, 833.....17, 21

State ex rel. McCormick v. Miller, 297 S.E.2d 448 (W. Va. 1982).....19, 21

State ex rel. Peter v. State Road Commission, 152 W.Va. 805, 166 S.E.2d 757 (1969).....19, 21

State ex rel. Rhodes v. West Virginia Department of Highways, 155 W.Va. 735, 187 S.E.2d 218 (1972 .....18, 21

STATUTE CITES

West Virginia Code Section 54-2-14 2

CONSTITUTIONAL PROVISIONS

Constitution of the United States, Amendment V.....2

PETITION FOR WRIT OF CERTIORARI

The Petitioners, Joseph Orlandi, et al., petition for writ of certiorari to issue to review an opinion of the West Virginia Supreme Court which upheld a decision by a Kanawha County, West Virginia Circuit Court refusing to require condemnation proceedings as to a parcel of land owned by the Petitioners which was damaged by the Respondent in the construction and widening of the West Virginia Turnpike.

OPINIONS BELOW

The final order of the West Virginia Supreme Court refusing a Petition of Appeal from which this Petition flows was rendered on September 24, 1998 and was not reported (see Appendix A). The opinion of the Kanawha County Circuit Court decision upon which the above West Virginia Supreme Court Petition was based was rendered on March 20, 1998 and was not reported (see Appendix B). This Petition is also based on an Order of the West Virginia Supreme Court entered on November 23, 1994 which remanded this case to the Kanawha County Circuit Court and is reported in 192 W.Va. 144, 451 S.E.2d 445 (1994) (see Appendix C).

JURISDICTION

Supreme Court jurisdiction is invoked pursuant to 28 U.S.C. Section 1651 and 2106 and Article III of the Constitution of the United States. The Final Judgment Order appealed from was entered on September 24, 1998. The Petitioners were granted an extension to file this Petition until January 23, 1999 by this United States Supreme Court. (See Appendix D).

CONSTITUTIONAL PROVISIONS IN QUESTION

Constitution of the United States, Amendment V.

No person shall be held to . . .; nor be deprived of life, liberty, or property without due process of law; nor shall private property be taken for public use without just compensation. (Emphasis added.)

Constitution of West Virginia, Article 3, Section 9.

Private property shall not be taken or damaged for public use, without just compensation; nor shall the same be taken by any company, incorporated for the purposes of internal improvement, until just compensation shall have been paid, or secured to be paid to the owner; and when private property shall be

taken, or damaged for public use, or for the use of such corporation, the compensation of the owner shall be ascertained in such manner, as may be prescribed by general law; provided that when required by either party, such compensation shall be ascertained by an impartial jury of twelve freeholders.

STATEMENT OF THE CASE

I. THE PROCEEDINGS AND NATURE OF RULINGS IN THE CIRCUIT COURT OF KANAWHA COUNTY, WEST VIRGINIA AND THE WEST VIRGINIA SUPREME COURT.

On or about May 19, 1984, the Petitioners filed a Petition for Writ of Mandamus in the Circuit Court of Kanawha County, West Virginia against the Respondents, the Commissioner of the West Virginia Department of Highways and the West Virginia Turnpike Commission to petition the Kanawha County Circuit Court to mandate that the Respondents institute a condemnation proceeding pursuant to West Virginia Code Section 54-2-14 (Condemnation Procedure) concerning an interest in real estate that Respondents took and denied Petitioners without just compensation. This lower Court conducted two evidentiary hearings

and ruled in favor of the Respondents in their Motion to Dismiss dated February 3, 1993. This case involves the Petitioners' ownership of certain surface and minerals tracts of land situate in and around Bradford Hollow, Loudon District, Kanawha County, West Virginia and in and around Lens Creek and Fields Creek in Loudon and Cabin Creek Districts of Kanawha County, West Virginia.

The pre-eminent issue of this case is whether the Respondents, the West Virginia Turnpike and the West Virginia Department of Highways, took or damaged a property right of the Petitioners without just compensation and without due process of law when they widened the West Virginia turnpike and closed off an eleven by twelve foot box culvert and replaced it with a six foot drain pipe, therefore, denying the Petitioners access and a right of way to their property. There were numerous discussions and arguments in the Kanawha County Circuit Court hearings involved in this case as to the transfers and deeds applicable to this case, all hinging around the discussion of whether, in fact, the Petitioners had a technical legal right of way that was taken by the Turnpike Commission. In

the Kanawha County Circuit Court's February 3, 1993 Order, the following conclusions of law were made (Appendix E):

1. There is no record of evidence that the 15 foot right of way was ever established or designated.
2. That any right to use the box culvert enured solely to the benefit of George Lee Peal, the owner of the surface of 1,126.25 acres, more or less, who is not a party to this action.
3. The Petitioners did not acquire the right to use the box culvert through predecessors-in-title.
4. The undesignated 15 foot right of way is not an appurtenance to the surface or mineral interest owned by the Petitioners.
5. The Respondents did not take or damage any property rights of the Petitioners and accordingly the petition seeking an issuance of writ of mandamus must be **DENIED**.

It is from these conclusions of law and their corresponding findings of fact that the Petitioners' originally appealed to the West Virginia Supreme Court. The Petitioners' position in said appeal was that according to the applicable West Virginia case law the Petitioners have a statutory and constitutional right to condemnation proceedings if the construction of the turnpike damaged their property even if the

same did not result in an actual taking of said property. On November 23, 1994, the West Virginia Supreme Court reversed and remanded the above Kanawha County Circuit Court Order with directions (see Appendix C). Specifically, this Supreme Court decision reversed certain of the conclusions of the Circuit Court and asked that a particular 1956 Deed be interpreted by the Kanawha County Circuit Court to decide whether in fact the Petitioners owned a right of way that was taken by the Respondent. According to the West Virginia Supreme Court, if the conclusion of said interpretation was that the Petitioners' right of way was not extinguished by prior deed, then a writ of mandamus should be granted and condemnation proceedings should be instituted.

Specifically, the West Virginia Supreme Court stated in Page 7 of its opinion that the Court "believes that the Petitioners in the proceedings before the Circuit Court introduced evidence suggesting that they did have title to an easement across the land on which the West Virginia Turnpike was ultimately constructed and widened." This opinion was based on the reservation of the

right of way in the predecessor-in-title to said land's September 8, 1936 deed, of record in the Kanawha County Clerk's Office in Deed Book 420, at Page 301, and the mention of said right of way in the July 12, 1977 deed which conveyed the property to Joseph Orlandi who subsequently transferred it to the Petitioners.

The West Virginia Supreme Court further stated in Page 10 that "the Court believes that a clear reading of the 1936 deed indicates that the Bradford Estate did intend to reserve and establish the fifteen foot right of way." This Court then went on to state that the only remaining outstanding matter that is necessary for the Circuit Court to decide prior to institution of condemnation proceeding is whether the 1956 deed from the Bradford Estate transferred to the West Virginia Turnpike Commission transferred the 15 foot right of way reserved by the estate in the September 8, 1936 deed, and therefore extinguished any ability to transfer the same to Joseph Orlandi. (See Page 11 of Appendix C.) Therefore, the West Virginia Supreme Court remanded this case and mandated that the Circuit Court construe the 1956 deed and

decide whether the right of way was transferred to the West Virginia Turnpike Commission, and therefore whether said deed extinguished any right of way rights that the Orlandis purchased in 1977. The West Virginia Supreme Court therefore implicitly concluded that it was necessary that Petitioners have technical legal right of way that was denied in order for condemnation proceedings to proceed. This ruling was made in spite of the fact that there was uncontroverted evidence that the Petitioners were damaged as a result of the widening of the turnpike regardless of whether they owned a right of way.

The above-mentioned opinion by the West Virginia Supreme Court was rendered on November 23, 1994. This case was originally filed in the Circuit Court on or about June 6, 1984. The evidentiary hearings on the same were held in 1987. However, the Order that was originally appealed (and which resulted in the above-mentioned Supreme Court Opinion reversing and remanding and the same) was not entered until February 3, 1993. Following the remand, the Kanawha County Circuit Court issued a Final Order Denying Petitioners' Petition For Writ Of Mandamus On Remand From

The Supreme Court of Appeals of West Virginia (attached hereto as Appendix B of this Petition). In said Order, the Circuit Court made the following two (2) conclusions:

1. That the 1956 Deed in issue transferred the easement in question to the West Virginia Turnpike Commission effectively eliminating the possibility that any such easement was transferred to Petitioners by subsequent Deed; and
2. The Court concluded that the Petitioners have not been damaged and therefore the Writ of Mandamus should not be granted.

It is from this decision of the Kanawha County Circuit Court that Petitioners once again appealed to the West Virginia Supreme Count resulting in the September 24, 1998 Final Order (see Appendix A).

II. STATEMENT OF THE CASE AND THE FACTS

Two separate evidentiary hearings were conducted dated January 6, 1987 and September 9, 1988 in the Kanawha County Circuit Court. The hearings were held for the purpose of determining whether or not the Petitioners' Application for Writ of Mandamus to compel condemnation as against the Respondents should be granted. This matter involves numerous deed references and transfers which make the

case somewhat complicated, however, the following explanation is an attempt to make the events and circumstances clear to this Court. The Petitioners are owners of certain surface and mineral tracts of land situate in and around Bradford Hollow, Loudon District, Kanawha County, West Virginia.

The Petitioners are also joint owners of minerals in and underlying eight (8) tracts (hereinafter "mineral tracts") of real property lying between Lens Creek and Fields Creek in Loudon and Cabin Creek Districts of Kanawha County, West Virginia, which contain approximately 1126.25 acres. One George Lee Peal was or is the owner of the surface of these tracts. One of the Petitioners, Joseph Orlandi, is owner in fee simple of 161 acres of land located in the same vicinity of and abutting the above-mentioned tracts in Loudon District, Kanawha County, West Virginia.

The mineral only tracts mentioned above were obtained by Joe Orlandi (before transferring joint ownership to himself and his children, the other Petitioners in this action) from one Bradford B. Laidley, widower, William D. Laidley and Helen Laidley, his wife, and the Kanawha Valley Bank, N.A.,

Trustee (hereinafter "Bradford B. Laidley, et al."). Bradford B. Laidley, et al. was also the surface owner of George Lee Peal's predecessor in title, Bradford B. Laidley et al. having owned these eight (8) tracts at one time in fee.

The Peals purchased the surface from Bradford Laidley, et al. by deeds dated April 7, 1951 and September 15, 1951.

There was also yet another contiguous parcel that passed from George Laidley consisting of 46.186 acres divided into three tracts located in Kanawha County, West Virginia. This property was conveyed to Bedford Land Company, however, the Grantors reserved unto themselves certain rights which are enumerated in Deed Book No. 420, at Page 301 as follows:

> The Grantors herein hereby reserve for the benefit of themselves, their heirs, devisees, grantees and assigns a right of way fifteen (15) feets in width for a private road over and across the land hereby conveyed from the Kanawha River to the land owned by the Grantors herein lying back on south of the land hereby conveyed, as appurtenances to said back

> land, the location of said fifteen foot to be hereinafter designated and fixed by the Grantee herein, its successors and assigns which shall have the right to use said fifteen foot right of way in common with the Grantees herein, their heirs, successors, devisees, grantees and assigns, including the right to cross and re-cross the same but not in said manner as to impair, restrict or interfere with the full and free use thereof by the said Grantors herein, their heirs, devisees and grantees, successors and assigns and so to afford a crossing over the Chesapeake and Ohio Railway.

The Deed from Bradford B. Laidley, et al. to the Peals reserved the right of the Peals to use the fifteen (15) foot right of way created and reserved for the Laidleys in the above-mentioned transaction.

Mr. Orlandi (one of the Petitioners) purchased his 161 acre tract of property from Betty Corrie Vedder and Robert Vedder, her husband, and Elizabeth B. Bledsoe, unmarried, in deeds of acquisition dated August 30, 1974 and recorded in the said Clerk's Office.

In the mid-1950's, the West Virginia

Turnpike was initially created and began to obtain land to construct the turnpike. The West Virginia Turnpike obtained interest in land from Mr. and Mrs. Peal (predecessor to surface owner), and Bradford Laidley, et al. (predecessor to Petitioners' minerals only), and the Vedders and Ms. Bledsoe (predecessor to Mr. Orlandi's, 161 acre tract). The Peals conveyed to the West Virginia Turnpike Commission certain lands, however they reserved the right to use the following:

> For the purposes of ingress and egress only the underpass located on Map No. 76, filed herewith, together with so much of the land herein conveyed over and from the southerly outlet of said underpass to the property line of the property herein conveyed, and so much of the land herein conveyed extended from the northerly outlet of said underpass to the old county road.

Also, at the time of the turnpike construction, the Turnpike Commission received from Bradford Laidley, et al. a deed dated April 6, 1956, conveying to said Commission its interest in land necessary for the turnpike, however, the turnpike in said deed

deeded back to Bradford Laidley, et al., the following:

> The party of the second part [West Virginia Turnpike] hereby grants and conveys to the parties of the first part, their heirs, devisees, licensees and assigns, an easement of right of way twenty feet in width (except within the R.C. Box Culvert), in perpetuity, subject to the conditions, hereinafter set forth, for the construction, reconstruction, repair, maintenance, operation and use, in common with other, of an access roadway including ingress and egress to, from, and through a 11" x 12" reinforced concrete underpass crossing under the turnpike in the vicinity of the turnpike base line station 2138.

Approximately at the same time (1954) the predecessors to Mr. Orlandi's 161 acre tract conveyed enough property from said tract to the Turnpike Commission to build its turnpike. This transfer was evidenced by deed recorded in the aforesaid Clerk's Office at Deed Book 1085, at Page 170. As partial consideration for this transaction, the Turnpike Commission conveyed to Mr. Orlandi's predecessors in

title an easement of right of way in perpetuity which would extend through a box culvert. In 1974, these predecessors in title transferred this property to Joe Orlandi in which the transfer deed stated as follows:

> The parties of the first part do hereby grant and convey unto the party of the second part, those certain tracts or parcel of land, with all the improvements therein and all appurtenances thereunto belonging.

A Box Culvert which is referred to in the Deed from Bradford Laidley, et al. to the Turnpike (dated April 6, 1956) is located near if not abutting to the Petitioners' property. The exact location of the Box Culvert was disputed by the two experts that testified in this matter in the lower court. (See Pages 18 et. seq. and 86 et seq. of Transcript of September 9, 1988 hearing - Appendix F). This Box Culvert had originally been utilized as an access to the Kanawha River for a local road (Route 61/2). In 1983 when the West Virginia Turnpike was widened, the Turnpike Commission and the West Virginia Department of Highways closed the 11' x 12' Box Culvert and placed a six (6) foot drain pipe where it had been

located, therefore eliminating the possibility of vehicular traffic on said Box Culvert.

Testimony elicited in the Kanawha County Circuit Court hearing from Joseph Orlandi, one of the Petitioners in this matter was that this Box Culvert provided the most direct access to the Kanawha River and adjoining coal loading facilities for the Petitioners' property in question. He further testified that the Box Culvert prior to it being closed up was large enough for coal trucks to drive through, and in fact lumber trucks which had timbered the land south of the Box Culvert actually utilized and drove through said Box Culvert for several years prior to its closing. (See Page 58 of Transcript of September 9, 1988 hearing - Appendix F).

Also, Mr. Orlandi testified that if the Box Culvert were still open the railroad company had given him permission to transport coal either under or over the railroad tracks located next to and directly north of where the Box Culvert had been. (See Page 72 of Transcript of September 9, 1988 hearing - Appendix F).

There was also testimony by Joseph Orlandi that the West Virginia Turnpike Commission and

the West Virginia Department of Highways used a substantial amount of stone located on the Petitioners' property for which they were never compensated, and that the Respondents took two or three feet of their property pursuant to another property matter, and were never compensated for this. (See Page 61 of Transcript of September 9, 1988 hearing - Appendix F.) This testimony went unrebutted in the proceedings in the lower Court.

REASONS FOR GRANTING THE WRIT

The decisions below violate the Petitioners' Constitutional rights to not have their property taken or damaged without due process of law and without just compensation in direct conflict with United States and West Virginia Constitutions and the well established case law interpreting the same.

DISCUSSION

The law applicable to this case is well settled. The general rule applicable to cases of this character was stated im State ex rel. French v. State Road Commission, 147 W.Va. 619, 129 S.E.2d 831, 833 as follows:

> "The effect of the pertinent prior decisions of the Court is that if in a mandamus proceeding a landowner shows

> that a highway construction or improvement has resulted in probable damage to his private property without an actual taking thereof and that the landowner in good faith claims compensation therefor, he has thereby established a clear legal right, under the Constitution and statutes of this state and the decisions of this Court, to require the state road commission to institute proper proceedings in eminent domain to ascertain the compensation, if any, to which the landowner is entitled."

Therefore, it is abundantly clear that all of the lower Court decisions (West Virginia Supreme Court and Kanawha County Circuit Court) did not apply the proper analysis.

Even though it is clear that the Petitioners can show that they had a legal right of way through the box culvert to access their property, it is not necessary that they establish this right of way. All that is needed to be established is that they had a property interest that the widening of the turnpike damaged or resulted in probable damage and that Petitioners can show a good faith argument for damages. See State ex rel.

Rhodes v. West Virginia Department of Highways, 155 W.Va. 735, 187 S.E.2d 218 (1972). "Where the evidence is conflicting, but there is reason to believe that the construction of a road by the Respondents could have caused damage to the Petitioners' land, and the evidence indicates that there was probable damage, a Writ of Mandamus will require an institution of eminent domain proceedings in order to have the jury determine such issues". (State ex rel. McCormick v. Miller, 297 S.E.2d 448 (W.Va. 1982.) Citing State ex rel. Peter v. State Road Commission, 152 W.Va. 805, 166 S.E.2d 757 (1969)). As the original Petition to the West Virginia Supreme Court clearly stated, there was testimony that the widening of the turnpike denied the Petitioners access to their property and that the alternative access to their property would require them to transverse extra mileage, which would increase the cost of mining the coal on their property. Therefore, the standard for condemnation proceedings has been met in that the Petitioners have shown that because of the widening of the turnpike and action and activities of the Respondents, their property,

being the mineral interest underlying their acreage decreased in value." It is not necessary that the Respondents prove that they had an ownership right in the right of way through the box culvert, but simply that they have been utilizing said right of way in general to access their property and the widening of the turnpike caused their property probable damage. However, as stated above, it can clearly be established that the 1956 deed did not extinguish the Laidleys' fifteen foot right of way or the twenty right of way, and therefore they still own the same and conveyed it properly through the 1977 deed to Mr. Orlandi.

In the final Paragraph 4 of the Kanawha County Court's Final Order dated March 24, 1998, the Court stated as follows:

> "This Court further concludes that the Petitioners have not been damaged by the actions of the Respondents and that a mandamus action should not lie against the Respondents to proceed with condemnation hearings on this matter."

Damage is the issue to be decided in a condemnation proceeding. The lower Court had

before it a mandamus proceeding to decide the issue of whether a condemnation proceeding should be instituted. Whether damages have occurred to the Petitioners is not relevant in this initial proceeding. All that is needed to be established is that Petitioners had a property interest that the widening of the turnpike damaged or resulted in probable damage and that the Petitioners can show a good faith argument for damages. See State, ex rel. Rhodes v. West Virginia Department of Highways, 155 W.Va. 735, 187 S.E.2d 218 (1972). When the evidence is conflicting, but there is reason to believe that the construction of a road by the Respondents could have caused damage to the Petitioners' land, and the evidence indicates that there was probable damage, a Writ of Mandamus will require an institution of eminent domain proceeding in order to have the jury determine said issue. State, ex rel. McCormick v. Miller, 297 S.E.2d 448 (W.Va. 1982), citing State, ex rel. Peter v. State Road Commission, 152 W.Va. 805, 166 S.E.2d 757 (1969). See also, Griggs v. Graney, State Road Commissioner. 143 W.Va. 610 (103 S.E.2d 878). Syllabus, State, ex rel French v. State Road

Commission, 147 W.Va. 619, 129 S.E.2d 831 (1963).

Therefore, it was improper for the Court to conclude that there were no damages and to not order condemnation based thereupon. All that had to be established was probable damage. As set out in the initial Supreme Court Petition, there was ample evidence to establish probable damage in the mandamus proceedings below. There was ample testimony by one of the petitioners, Joe Orlandi, that if the Petitioners were required to transport the coal on their property via an alternate route other than through the right of way in dispute there would be additional mileage involved which would cost approximately $0.50 per ton more than if the coal on the property were transported through the original route. (See Page 13 of September 9, 1988 Transcript of Circuit Court Mandamus Proceedings) (Appendix F). This clearly is enough to establish probable damages and a jury should have been allowed to decide the issue.

CONCLUSION

For the foregoing reasons, Petitioners respectfully request that this Court grant this Petition and that a Writ of Certiorari be

issued in that the effect of the Lower Court's decisions is to deny the Petitioners just compensation and due process of law prior to the taking of property in violation of the applicable constitutions.

JOSEPH ORLANDI, et al.
By Counsel

CICCARELLO, DEL GIUDICE & LaFON

By: _____
Arthur T. Ciccarello
State Bar Code #732
Suite 100
1219 Virginia Street, East
Charleston, West Virginia 25301

IN THE SUPREME COURT OF THE UNITED STATES
OCTOBER TERM

JOSEPH ORLANDI, et al.,
DEBORAH A. ORLANDI SIGNORELLI,
KAREN ORLANDI PATERNO,
MICHAEL E. ORLANDI and
JOSEPH ORLANDI,

Petitioners,

v.

From the West Virginia Supreme Court
Appeal No. 98-3-462
Application No. A-462

CHARLES MILLER, Commissioner of
West Virginia Department of
Highways and the West Virginia Turnpike
Commission,

Respondent.

APPENDIX

APPENDIX A

STATE OF WEST VIRGINIA

At a Regular Term of the Supreme Court of Appeals continued and held at Charleston, Kanawha County, on the 24th day of September, 1998, the following order was made and entered:

Joseph Orlandi, Deborah A. Orlandi Signorelli, Karen Orlandi, Paterno, Michael E. Orlandi and Joseph Orlandi, Petitioners Below, Petitioners

vs.) No. 982018

Charles Miller, Commissioner of West Virginia Department of Highways, and West Virginia Turnpike Commission, Respondents

On a former day, to-wit, July 20, 1998, came the petitioners, Joseph Orlandi, Deborah A. Orlandi Signorelli, Karen Orlandi Paterno, Michael E. Orlandi and Joseph Orlandi, by Ciccarello, Del Giudice & LaFGon, Arthur T. Ciccarello and Timothy J. LaFon, their attorneys, and presented to the Court their petition praying for an appeal from a judgment of the Circuit Court of Kanawha County, rendered on the 20th day of March, 1998, with the record accompanying the petition. Thereafter, on the 11th day of August, 1998,

came the respondent, the West Virginia Department of Transporation, Division of Highways, by Anthony G. Halkais, Jeffrey J. Miller and Joseph M. Brown, its attorneys, and presented to the Court its written response in opposition thereto.

Upon consideration whereof, the Court is of opinion to and doth hereby refuse said petition for appeal.

A True Copy.

Attest: _____
Clerk, Supreme Court of Appeals

APPENDIX B

IN THE CIRCUIT COURT OF KANAWHA COUNTY,
WEST VIRGINIA

JOSEPH ORLANDI,
DEBORAH A. ORLANDI SIGNORELLI,
KAREN ORLANDI PATERNO,
MICHAEL E. ORLANDI and
JOSEPH ORLANDI,

Petitioners,

v. Civil Action No. 84-P-MISC-340

CHARLES MILLER, Commissioner of
West Virginia Department of Highways and
WEST VIRGINIA TURNPIKE COMMISSION,

Respondents.

FINAL ORDER
DENYING PETITIONERS'
PETITION FOR WRIT OF MANDAMUS
ON REMAND FROM THE
SUPREME COURT OF APPEALS OF WEST VIRGINIA

This matter is before the Court on remand with instructions from the Supreme Court of Appeals of West Virginia.

This Court is directed to "... construe the 1956 deed from the Bradford Estate to the West Virginia Turnpike Commission to determine whether the deed did, in fact, extinguish or transfer away the Bradford Estate's easement reserved in the 1936 deed, and that after

making such construction, the court ruled whether the July 12, 1977, deed language purporting to transfer the easement reserved and excepted in the 1936 deed." Orlandi v. Miller, 451 S.E. 445, 450 (W.Va. 1994 (*per curiam*). The Supreme Court of Appeals of West Virginia continued its directions to this Court, "In the event the court concludes that the appellants, as the successors of Joseph Orlandi, do have an easement, the Court believes that it is appropriate, since the easement inevitably crossed the West Virginia Turnpike, ..., that the West Virginia Department of Highways be directed to institute mandamus proceedings to insure that the appellants receive just compensation for the damage to their easement," Id.

This Court has before it the complete record in this matter, the "Status Memorandum" filed by petitioners and the "Brief of Defendants[/Respondents]" filed by respondents.

Petitioners argue that the pre-eminent issue in this matter is whether the respondents took or damage a property right of the petitioner when they widened the Turnpike and closed an eleven by twelve foot box

culvert and replaced it with a six foot drain pipe, therefore, denying the petitioners access and a right of way to their property. Petitioners argue that the 1956 deed clearly indicates that the easement was reserved by the prior 1936 deed and that said easement was then transferred to Orlandi by the 1977 deed.

Respondents argue that this Court was correct in its initial determination that the easement was never transferred to the petitioners by way of the 1977 deed. Furthermore, respondents argue the language of the release itself sets forth that the Turnpike was a controlled access highway, the purpose of the release was to insure that all rights of way and easements were purchases, paid for, and released at the time of the execution of the instrument, and that to construe the instrument and the language contained therein in any other fashion would allow the compromise of access control to the Turnpike. This Court is of the opinion that respondents' argument is correct and that the 1956 deed language supports this position.

OPINION

The Court finds that the critical and determinative language in this matter is

contained in the 1956 deed between the Bradford B. Laidley, Trustee and the West Virginia Turnpike Commission dated April 6, 1956, and recorded in Deed Book 1174, at Page 11, which recites in part:

> "Although it is recognized that the party of the second part may use, sell or otherwise dispose of all or any portion of the land hereby conveyed as if its intended use were not mentioned herein, it is understood by the parties of the first part that the said parcel of real estate is presently intended for use in connection with the construction, maintenance, operation and/or iuse of a non-access Turnpike, in furtherance of which, **the parties of the first part, whether the owner of other remaining or other land adjoining said Turnpike, or of any interest therein or not, do hereby grant, convey, release and forgo unto the said party of the second part unless heretofore expressly reserved or excepted, all easements of way over, across, along, through, upon or under the lands hereby conveyed and all rights and easements of access to or egress from said lands and hereby releases the party of the second part, its successors and assigns,** from any and all claims for damages or compensation of any nature whatsoever arising either directly or indirectly from the construction, maintenance, operation and use of the said Turnpike ...." (all emphasis added)

The language ("underlined" and in "bold"

above) from the 1956 deed clearly indicates that only an express reservation or exception of any easement would be retained by the grantors. This Court is of the opinion that said language clearly indicates that such a reservation or exception would be indicated in this deed, but was not because the parties intended that a complete transfer of the property be completed so as to further the construction of the closed access Turnpike, as was indicated in the language of the deed.

CONCLUSIONS

1. This Court concludes that the 1956 deed between the Bradford B. Laidley, Trustee and the West Virginia Turnpike Commission, dated April 6, 1956, and recorded in Deed Book 1174, at Page 11, transferred and conveyed any existing easement to the West Virginia Turnpike Commission.

2. This Court further concludes that because of the transfer under the 1956 deed, the 1977 deed between Bradford B. Laidley, widower, William D. Laidley and Helen Laidley, his wife, and the Kanawha Valley Bank, N.A., Trustee and Joseph Orlandi, dated September 22, 1997, and recorded in Deed Book 1845, at Page 290, did not contain the easement which

is the subject of this action because said easement was not part of the 1977 deed at that time, having been transferred by the 1956 deed to the West Virginia Turnpike Commission.

3. This Court further concludes that the easement was effectively transferred by the 1956 deed such that the chain of title which contained the easement at issue in this matter could only be transferred to the petitioners by the West Virginia Turnpike Commission by way of a new deed through the 1956 deed. This Court finds that no such transfer between the West Virginia Turnpike Commission and the petitioners ever occurred.

4. This Court further concludes that the petitioners have not been damaged by the actions of respondents and that a mandamus action should not lie against the respondents to proceed with condemnation hearings on this matter.

RULING

Based on the foregoing, the Court **ORDERS** that the petitioners' petition for writ of mandamus and request for setting this matter on the Court's docket for condemnation proceedings, on remand from the Supreme Court of Appeals of West Virginia, is hereby **DENIED**.

It is further **ORDERED** that this matter is hereby **DISMISSED** and **STRICKEN** from the docket of this Court.

It is further **ORDERED** that the Circuit Clerk shall send a certified copy of this Order to all parties or counsel of record. The Court notes the objection of the party of parties aggrieved by this Order.

IT IS SO ORDERED

DATE: March 20, 1998

ENTER:

_____
HERMAN CANADY, JR.,Judge
Thirteenth Judicial Circuit

APPENDIX C

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

September 1994 Term

No. 22016

JOSEPH ORLANDI, DEBORAH A. ORLANDI, SIGNORELLI,
KAREN ORLANDI PATERNO, MICHAEL E. ORLANDI,
AND JOSEPH ORLANDI,
Plaintiffs Below, Appellants,

v.

CHARLES MILLER, COMMISSIONER OF WEST VIRGINIA DEPARTMENT OF HIGHWAYS, AND
THE WEST VIRGINIA TURNPIKE COMMISSION,
Defendants Below, Appellees

Appeal from the Circuit Court of Kanawha County
Honorable Herman G. Canady, Jr., Judge
Civil Action No. 84-P-Misc-340

REVERSED AND REMANDED WITH DIRECTIONS

Submitted: September 27, 1994
Filed: November 23, 1994

Arthur T. Ciccarello
Timothy J. LaFon
Ciccarello, Del Giudice & LaFon
Charleston, West Virginia
Attorneys for the Appellants

Anthony G. Halkias
Joseph M. Brown
Charleston, West Virginia
Attorneys for the Appellees

SYLLABUS BY THE COURT

"`If a highway construction or improvement results in probable damage to private property without an actual taking thereof and the owners in good faith claim damages, the State Road Commissioner has the statutory duty to institute proceedings within a reasonable time after completion of the work to ascertain damages, if any, and, if he fails to do so, after reasonable time, mandamus will lie to require the institution of such proceedings.' Point 1 Syllabus, State ex rel. Griggs v. Graney, State Road Com'r, 143 W.Va. 610 [103 S.E.2d 878]." Syllabus, State ex rel. French v. State Road Commission, 147 W.Va. 619, 129 S.E.2d 831 (1963).

Per Curium:

This is an appeal by Joseph Orlandi, and others, from the refusal of the Circuit Court of Kanawha County to mandamus the appellees, the Commissioner of the West Virginia Department of Highways and the West Virginia Turnpike Commission, to institute condemnation proceedings against an easement which the appellants claim was blocked when improvements were made to the West Virginia Turnpike. On appeal, the appellants claim they have a clear legal right to the issuance of the writ of mandamus, and they pray that this Court reverse the decision of the circuit court and direct the appellees to institute the condemnation proceedings which they seek.

The appellants, or some of them, own the coal, and the right to mine the same, under approximately 1,126 acres of hill land located in and around Bradford Hollow in Loudon District, Kanawha County, West Virginia. The appellants, Deborah A. Orlandi Signorelli, Karen Orlandi Paterno, Michael E. Orlandi, and Joseph Orlandi, obtained their interests by deed dated September 22, 1977, from their father, Joseph Orlandi, who shortly before, on July 12, 1977, had purchased the interests

from the estate of William A. Bradford, Jr.[1] This deed transferring the rights from the Bradford Estate to Joseph Orlandi also conveyed an easement from the coal lands to the Kanawha River. The deed said that the grant was made:

> Together with appurtenances appertaining to the coal and the right to mine coal in and under the aforesaid . . . land . . .; including but not limited to, a right of ingress and egress in common with the party of the first part, its successors and assigns, from the hill

---

[1] The estate of William A. Bradford, Jr., which has conducted business for many years, has had a number of managers. Initially, George B. Laidley served as its Administrator, C.T.A. He was succeeded by Bradford B. Laidley, Trustee, and he, in turn was succeeded by the Kanawha Valley Bank as Successor Trustee. The deeds from the Bradford Estate referred to herein were executed by the manager in charge at the time of the deed. For simplicity's sake, this opinion will simply refer to the conveyances or deeds as having been made by the Bradford Estate.

As will be discussed further in note 3, infra, it is not clear whether, in transferring the Coal interests to the other appellants, his children, Joseph Orlandi red an interest in the 1,126 acres of coal.

> land to the Kanawha River on that certain right of way reserved in the aforesaid deed from George S. Ladle, Administrator, with the will annexed of the estate of William A. Bradford, Jr., dated September 8, 1936, and of record in the Clerk's Office in Deed Book 420, page 301.

The 1936 deed referred to in this paragraph had transferred away from the Bradford Estate a parcel of bottom land lying between the Kanawha River and the hill land underlaid by the coal which was subsequently conveyed to Joseph Orlandi. In transferring away the bottom land, it appears that the Bradford Estate intended to reserve an easement across the bottom land from the Kanawha River, for the 1936 deed from the Bradford Estate specifically provided:

> The grantors herein hereby reserve for the benefit of themselves, their heirs, devisees, grantees and assigns, a right of way fifteen (15) feet in width for a private road over and across the land hereby conveyed from Kanawha River to the land now owned by the grantors herein, lying back or south of the land hereby conveyed, as an appurtenance to said back land, the location of said fifteen foot right of way to be hereafter designated

> and fixed by the grantee herein, it successors and assigns, which shall have the right to use said fifteen foot road in common with the grantors herein, their heirs, successors, devisees, grantees and assigns, including the right to cross and recross the same, but not in such manner as to impair, restrict or interfere with the full and free use thereof by the said grantors herein, their heirs, devisees, grantees, successors and assigns, and so as to afford a crossing over the Chesapeake & Ohio Railway.

The controversy giving rise to the present proceeding arose when, in the course of renovating the West Virginia Turnpike and converting it to standards required for an interstate highway, the respondents, the West Virginia Department of Highways and the West Virginia turnpike Commission, blocked a box culvert which ran through and under the original West Virginia Turnpike.

On June 6, 1984, the appellants, who claimed that they owned an easement which ran through the box culvert closed in the improvement of the West Virginia Turnpike, filed a petition with the Circuit Court of Kanawha County praying that the court issue a mandamus commanding and directing the appellees to restore the right-of-way which

ran through the box culvert or, in the alternative, to institute an eminent domain proceeding to condemn the right-of-way.

In the course of the development of the action in the circuit court, it was shown that on April 6, 1956, the Bradford Estate had conveyed land to the West Virginia Turnpike Commission over which the West Virginia Turnpike was built and across which the box culvert in issue was built. That 1956 deed specifically provided:

> [The parties of the first part [the Bradford Estate] . . . do hereby grant, convey, release and forgo unto the said party of the second part [the West Virginia Turnpike Commission], unless heretofore expressly reversed or excepted, all easements of way over, across, through, upon or under the lands hereby conveyed, and all rights and easements of access to and egress from said lands hereby conveyed . . . .

It appears that this deed language interjected the question of whether the Bradford Estate, by executing this deed, transferred to the West Virginia Turnpike Commission the easement previously reserved in the 1936 deed. If it did effectively transfer that easement to the West Virginia Turnpike Commission, the Bradford Estate did not own it

and consequently could not, and did not, transfer the easement to Joseph Orlandi by its July 12, 1977 deed, and if the Bradford Estate did not pass the easement to Joseph Orlandi, the other applicants, as grantees of Joseph L. Orlandi, did not receive it.

To complicate the matter further, the West Virginia Turnpike Commission, in the April 6, 1956, deed, specifically granted the Bradford Estate a right-of-way which was, at most points, twenty feet wide. It rather clearly appears that the box culvert was closed during the widening of the Turnpike was located on this easement and that the twenty-foot right-of-way ran through the culvert.[2]

In the course of the proceedings in the case, the appellants essentially took the position that the fifteen-foot-easement reserved by the Bradford Estate in the 1936 deed to the Bedford Land Company was not extinguished by the 1956 deed to the West Virginia Turnpike Commission and that, in

---

[2] It is not clear whether the box culvert was on the bottom land conveyed away by the Bradford Estate in 1936, but is appears that the appellants are claiming that it clearly was.

truth, the 1936 easement ran over the course of the twenty-foot easement granted by the West Virginia Turnpike Commission to the Bradford Estate.

After conducting hearing in this case, the trial court found, among other tings, that there was no record evidence to show that the fifteen-foot right-of-way was ever established or designated and that, as a consequence, the appellants did not acquire the right to the use of the box culvert through their predecessors in title. The court also concluded that, since the appellants did not acquire the right to use the box culvert, the Department of Highways and Turnpike Commission, in widening the Turnpike and eliminating the culvert, did not damage property rights of the appellants.

In the present proceeding, the appellants, while recognizing that the evidence relating to their property rights is conflicting, contend that the circuit court erred in not granting their petition for a writ of mandamus and in not compelling the institution of an eminent domain condemnation proceeding.

This Court has recognized that an agency of the State of West Virginia may be required by

mandamus to institute eminent domain proceedings in order to ascertain just compensation for private land taken or damaged for State highway purposes. To be entitled to mandamus relief, the parties seeking such relief are not required to establish that they will ultimately recover damages in the requested condemnation proceeding. They must only show that they have suffered probable damage to their private property. See State ex rel. Rhodes v. West Virginia Department of Highways, 155 W. Va. 735, 187 S.E.2d 218 (1972), and State ex rel. French v. State Road Commission, 147 W.Va. 619, 129 S.E.2d 831 (1963), where it is stated in the single syllabus point that:

> "If a highway construction or improvement results in probable damage to private property without an actual taking thereof and the owners in good faith claim damages, the State Road Commissioner has the statutory duty to institute proceedings within a reasonable time after completion of the work to ascertain damages, if any, and, if he fails to do so, after reasonable time, mandamus will lie to require the institution of such proceedings." Point 1 Syllabus, State ex rel. Griggs v. Graney, State Road Com'r, 143 W.Va. 610 [103 S.E.2d 878].

It appears that in the present case the real issue is whether the appellants, through the July 12, 1977, conveyance from the Bradford Estate to Joseph Orlandi, acquired a right-of-way which was subsequently damaged or destroyed when the West Virginia Department of Highways and the West Virginia Turnpike Commission widened the West Virginia Turnpike and eliminated the box culvert which ran under it.

This Court believes that the appellants, in the proceedings before the circuit court, introduced evidence suggesting that they did have title to an easement across land over which the West Virginia Turnpike was ultimately constructed and widened. As previously indicated, the deed from the Bradford Estate to Joseph Orlandi dated July 12, 1977, stated that the Bradford Estate, in addition to transferring the coal under the 1,126 acres which was involved in the deed, transferred to Joseph Orlandi the appurtenances appertaining to the coal, "including but not limited to, a right of ingress and egress in common with the party of the first part, its successors and assigns, from the hill land to the Kanawha River on

that certain right of way reserved in the . . . deed from George S. Ladle . . . dated September 8, 1936, and of record in the Clerk's office in Deed Book 420, page 301." A further examination of the facts presented shows that in the 1936 deed, the Bradford Estate expressly reserved for the benefit of itself and its grantees and assigns, a right-of-way fifteen feet in width across the land conveyed from the Kanawha River to the hill land under which the coal subsequently conveyed to the Orlandis lay.

The documents presented, however, raise the question of whether the 1956 deed from the Bradford Estate transferred to the West Virginia Turnpike Commission the fifteen-foot right-of-way reserved by the Estate in the September 8, 1936 deed and purportedly subsequently transferred to Joseph Orlandi by the July 12, 1977, deed.

In examining the April 6, 1956 , deed language, this Court notes that by the language the Bradford Estate did not grant and convey and release to the Department of Highways all easements across the lands conveyed and all easements from the lands conveyed, "unless heretofore expressly

reserved or excepted."

The Court believes that this language is somewhat ambiguous. Although the Bradford Estate purported to convey away all rights-of-way over the lands conveyed, the transfer of easements is conditional and rather clearly does not cover easements "heretofore expressly reserved or excepted".

In examining the language of the 1956 deed, this Court notes that prior to the inclusion of the phrase "unless heretofore expressly reserved or excepted," there was language in the 1956 deed reserving and excepting certain mineral and subterranean rights, but it is not clear that those were easements or rights-of-way within the meaning of the phrase "heretofore expressly reserved and excepted." The inclusion of the language "heretofore expressly reserved and excepted", therefore, raises, in this Court's view, some ambiguity as to what the grantor intended. Did the Bradford Estate, as grantor, simply include the quoted language with the view that since nothing was excepted or reserved, it was conveying all its right-of-way, or did the clause "heretofore expressly reserved or excepted" refer to the mineral and

subterranean rights previously discussed in the deed or did it refer to express reservations or exceptions in prior deeds in the chain of title, such as the 1936 deed?

The law is rather clear in this State that where there is ambiguity in a deed, it is appropriate that it be construed. See Hall v. Hartley, 146 W.Va. 328, 119 S.E.2d 759 (1961); Bennett v. Smith, 136 W.Va. 903, 69 S.E.2d 42 (1952); Meadow River Lumber Company v. Smith, 126 W.Va. 847, 30 S.E.2d 392 (1944); and Paxton v. Benedum-Trees Oil Co., 80 W.Va. 187, 94 S.E. 472 (1917).

In view of the ambiguity of the clause "unless heretofore expressly reserved or excepted" in the context of the totality of the language in the 1956 deed, this Court believes that some construction of the 1956 deed from the Bradford Estate is required, and, in the absence of an appropriate construction of the 1956 deed, the Court cannot conclude that there was a sufficient basis for the trial court to rule that the Department of Highways and the West Virginia Turnpike Commission did not take or damage any rights of the appellants.

The Court notes that the trial court

further found that there was no record evidence that the fifteen-foot right-of-way was ever established or designated.

This Court believes that a clear reading of the 1936 deed indicates that the Bradford Estate did intend to reserve and establish the fifteen-foot right-of-way.

The trial court apparently based its ruling on the evidence that the bounds of the fifteen-foot right-of-way were never laid out and that the right-of-way was never used. There was some conflicting evidence on this point. The evidence presented by the appellants essentially was that the fifteen-foot right-of-way ran over the twenty-foot right-of-way which was later described by, and specifically granted by, the West Virginia Turnpike Commission in the 1956 deed, and there was evidence that the twenty-foot right-of-way had been used. At any rate, there is law in this State that an existing right-of-way is not defeated by mere non-user. Wooldridge v. Coughlin, 46 W.Va. 345, 33 S.E. 233 (1899). Additionally, as late as 1988, the Court indicated that while easements created equitably may be extinguished by acts including abandonment, easements by grant,

such as the easement claimed in the present case, may not. See note 5 of Lyons v. Lyons, 179 W.Va. 712, 371 S.E.2d 640 (1988), which cites Moyer v. Martin, 101 W.Va. 19, 131 S.E.859 (1926).

Under the circumstances of the present case, the Court believes that it is appropriate that this case be remanded to the Circuit Court of Kanawha County with directions that the court, after affording the parties a reasonable opportunity to be heard, construe the 1956 deed from the Bradford Estate to the West Virginia Turnpike Commission to determine whether that deed did, in fact, extinguish or transfer away the Bradford Estate's easement reserved in the 1936 deed, and that after making such construction, the court rule whether the July 12, 1977 , deed language purporting to transfer to Joseph Orlandi actually did transfer the easement reserved and excepted in the 1936 deed.

In the event the court concludes that the appellants, as the successors of Joseph Orlandi, do have an easement, the Court believes that it is appropriate, since the easement inevitably crossed the West Virginia

Turnpike, either through the box culvert which was closed or at some other point which the Turnpike has blocked, that the West Virginia Department of Highways be directed to institute mandamus proceedings to insure that the appellants receive just compensation for the damage to their easement.

For the reasons state, the judgment of the Circuit Court of Kanawha County is reversed, and this case is remanded for further development in accordance with the foregoing.[3]

---

[3] The Court has been hampered somewhat in the analysis of this case by the fact that few of the actual deeds referred to were included in the designated and printed record presented to the Court. A barely legible entire copy of the 1956 deed was included, but for most of the rest the Court has had to rely on lengthy quotes provided by the parties.

It is not completely clear whether Joseph Orlandi, in transferring the 1,126 acre coal interest and appurtenant rights to his children by the September 22, 1977, deed retained an interest in the property for himself or whether he conveyed away all he owned. If he, in fact, retained an interest, and if it ultimately is decided that the July 12, 1977 deed effectively transferred an easement, then Joseph Orlandi will be a proper party to any subsequent condemnation proceeding. If, in fact, however, he conveyed away all his interest to his children by the

Reversed and remanded with directions.

September 22, 1977 deed, he, of course, would not be a proper party to the condemnation proceeding. The Court notes that Joseph Orlandi owned a separate tract adjacent to the 1,126 acre coal tract, and it appears that he may be claiming an easement interest appurtenant to this tract. From the record presented to this Court, the Court cannot see how he has such an easement interest, but on further development of this case on remand it may appear that he has such an interest. If it does, and if that interest was damaged by the improvements to the West Virginia Turnpike, this Court believes that it would be appropriate for the circuit court to mandamus condemnation of that interest.

APPENDIX D

December 7, 1998

Mr. Arthur T. Ciccarello
Suite 100
1219 Virginia Street, East
Charleston, West Virginia 25301

Re: Deborah A. Orlandi, et al.
V. Charles Miller, Commissioner,
West Virginia Department of
Highways, et al.
Application No. A-462

Dear Mr. Ciccarello:

The application for an extension of time within which to file a petition for a writ of certiorari in the above-entitled case has been presented to the Chief Justice, who on December 7, 1998, extended the time to and including January 23, 1999.

This letter has been sent to those designated on the attached notification list.

Pursuant to Rule 22.2, the original and two copies of an application for extension of time is required.

Sincerely,

WILLIAM K. SUTER, Clerk

By

Loretta S. Ruffin
Assistant Clerk

NOTIFICATION LIST

Mr. Arthur T. Ciccarello
Suite 100
1219 Virginia Street, East
Charleston, WV 25301

Mr. Anthony Halkais
WV Department of Highways
1900 Kanawha Boulevard, East
Charleston, WV 25305-0430

Clerk
Supreme Court of Appeals
of West Virginia
E-317 State Capitol
Charleston, WV 25305-0001

APPENDIX E

IN THE CIRCUIT COURT OF KANAWHA COUNTY, WEST VIRGINIA

JOSEPH ORLANDI, DEBORAH A. ORLANDI SIGNORELLI, KAREN ORLANDI PATERNO, MICHAEL E. ORLANDI, and JOSEPH O. ORLANDI,

Petitioners,

vs. 84-P-Misc-348

CHARLES MILLER, Commissioner of West Virginia Department of Highways, and THE WEST VIRGINIA TURNPIKE COMMISSION,

Respondents.

O R D E R

Comes now the Petitioners by their counsel, Arthur T. Ciccarello and Michael J. Del Giudice and the Respondent , Charles Miller, Commissioner of West Virginia Department of Highways, by his counsel, Anthony G. Halkias and Joseph M. Brown, and Respondent, West Virginia Turnpike Commission by its counsel A. David Abrams, Jr.

PROCEDURE

This matter being before the Court upon the Petition for an award of a writ of mandamus against the Respondents for the taking of an interest in real property without just compensation the answers of each Respondent and a Motion for Judgment on the pleadings by Petitioners and a Motion to Dismiss by Respondent, West Virginia Turnpike Commission. A full evidentiary hearing was held on January 6, 1987, and upon motion of the Petitioner an additional evidentiary hearing was held where the testimony of Bernard "Duffy" Horan, Esquire, and Donald Santee, Esquire, was elicited as expert witnesses concerning the source of title to the Orlandi tract in relation to a 15 foot right of way. The Court, after having reviewed the pleadings filed herein, the testimony of witnesses and the exhibits admitted into evidence and having maturely considered the same, does hereby find:

FINDINGS OF FACT

1. Deborah A. Orlandi, Karen O. Paterno, Michael E. Orlandi and Joseph O. Orlandi are

the joint owners of the minerals in and underlying eight (8) tracts of real property lying between Lens Creek and Fields Creek in Louden and Cabin Creek Districts, Kanawha County, West Virginia, which tracts are fully described in the latest deed of record from Joseph Orlandi and Carol Orlandi, his wife, to Deborah A. Orlandi, Karen O. Paterno, Michael E. Orlandi and Joseph O. Orlandi dated September 22, 1977, of record in the Office of the Clerk of the County Commission of Kanawha County in Deed Book No. 1845, at page 290, containing 1,126.25 acres, more or less.

2. George Lee Peal is the owner of the surface of eight (8) tracts of real property lying between Lens Creek and Fields Creek in Louden and Cabin Creek Districts, Kanawha County, West Virginia, which tracts are fully described in the deed from Bradford B. Laidley, Trustee, et al., to Carl E. Peal and Dorothy Peal, his wife, dated April 7, 1951, and recorded in the Office of the Clerk of the County Commission of Kanawha County in Deed Book No. 954, at page 312, containing 1,126.25 acres, more or less.

3. Joseph Orlandi is the owner in fee simple of 161 acres of land located in Louden

District, Kanawha County, West Virginia and more fully and particularly described in a deed dated August 30, 1974, from Betty Corrie Vedder and Robert Vedder, her husband, of record in the Office of the Clerk of the County Commission of Kanawha County in Deed Book No. 1741, at page 244.

4. In that certain deed dated September 8, 1936, and of record in the Office of the Clerk of the County Commission of Kanawha County in Deed Book 420, at page 301, George S. Laidley, Administrator, et al, conveyed to Bedford Land Company 46.186 acres in three tracts located in Kanawha County, West Virginia, subject to certain exceptions. Item Eighteen of the exceptions reads as follows:

> "The Grantors herein hereby reserve for the benefit of themselves, their heirs, devisees, grantees and assigns a right of fifteen (15') feet in width for a private road over and across the land hereby conveyed from the Kanawha River to the land owned by the Grantors herein lying back or south of the land hereby conveyed, as an appurtenance to said back land, the location of said fifteen foot right of way to be hereinafter designated and fixed by the Grantee herein, its successors and assigns, which shall have the right to use said fifteen foot right of way in common with the Grantors herein, their heirs, successors,

devisees, grantees and assigns including the right to cross and recross the same, but not in such manner as to impair, restrict or interfere with the full and free use thereof by the said Grantors herein, their heirs, devisees and grantees, successors and assigns and so as to afford a crossing over the Chesapeake & Ohio Railway."

5. In that certain deed dated April 6, 1955, between Bradford B. Laidley, Trustee, et al, and The West Virginia Turnpike Commission of record in the Office of the Clerk of the County Commission of Kanawha County in Deed Book No. 1164, at page 11, there is contained the following language:

"The party of the second part hereby grants and conveys to the parties of the first part, their heirs, devisees, licensees and assigns, an easement of right of way twenty (20') feet in width (except within the R. C. Box Culvert) in perpetuity, subject to the conditions hereinafter set forth, for the construction, reconstruction, repair, maintenance, operation and use, in common with others, of an access roadway including ingress and egress to, from, and through an 11' x 12' reinforced concrete underpass crossing under the Turnpike in the vicinity of Turnpike Baseline Station 2138, which said easement

of right of way is more particularly bounded and described as follows:

> BEGINNING at a point 150 feet to the left of, and at right angles to, West Virginia Turnpike Centerline Station 2137+79, said point being on the southern right of way line of the West Virginia Turnpike; thence in a northeasterly direction 65 feet, more or less, to a point in the center of the southern end of and 11' x 12' reinforced concrete box culvert crossing underneath the West Virginia Turnpike, and being a strip of land 10 feet, more or less, on each side of said 65 foot line, forming a 20 foot wide strip, more or less, and said strip continuing through the reinforced concrete box culvert, being the same width as the inside of said reinforced concrete box culvert, passing Turnpike Baseline Station 2138+00; thence continuing from the northern end of said reinforced concrete box culvert to the present

road with the shortest possible length and width, varying from the inside width of the reinforced concrete box culvert to a maximum of 45 feet at the intersection of the present road, as shown on that certain map attached hereto and made a part hereof entitled "WEST VIRGINIA TURNPIKE COMMISSION RIGHT OF WAY MAP, Louden District, Kanawha County, West Virginia", Map No. 76, dated July 7, 1953, revised 7-8-53, 1-9-54 and 1-26-54, prepared by James Sell, Reg. C.E. 772; said easement being shown thereon colored in red.

The parties of the first part expressly agree that the foregoing easement of right of way is subject to the following conditions:

1. The parties of the first part will not block, barricade, create any hazard or otherwise use this easement of right of way, including the facilities of said reinforced concrete underpass, in such a manner as to

interfere with their use in common with others.

2. The parties of the first part will not place upon, under or adjacent to the Turnpike right of way or in the said reinforced concrete box culvert, any type of structure, store any materials, or take any other actions which, in the opinion of the Chief Engineer of the Turnpike Commission, would create a hazard to, or otherwise interfere with, the construction, reconstruction, repair, maintenance, eventual widening and expansion, operation and use of the Turnpike.

The foregoing represents the entire conveyance and agreement between the parties hereto in reference to the lands, interests in land, claims and rights conveyed or released, not already fully performed."

6. Prior to acquisition by The West

Virginia Turnpike Commission, the 11' x 12' reinforced concrete box culvert was available for vehicular traffic using local service road then designated as 61/2. 61/2 was located adjacent to the southern boundary line of the C & O Railroad property and connected, in a westerly direction, with State Route 119.

7. Subsequent to the acquisition by The West Virginia Turnpike Commission the 11' x 12' reinforced concrete box culvert was modified precluding vehicular traffic and local service road 61/2 was relocated on the south side of The West Virginia Turnpike property connecting, in a westerly direction, with State Route 119.

8. The immediate predecessor in title to the 161 acre tract now owned by Joseph Orlandi in fee simple was Betty Corrie Vedder and Robert Vedder, her husband, and Elizabeth B. Bledso, unmarried. There was no mention of an appurtenant right of way through the box culvert or a right of way to the Kanawha River crossing the C. & O. Railway in the deeds of acquisition dated August 30, 1974, and recorded in said Clerk's Office in Deed Book No. 1741, at page 244, and dated August 30, 1974, recorded in said Clerk's Office in Deed

Book No. 1741, at page 254, being counterpart deeds.

9. Joseph Orlandi acquired the mineral interest underlying the 1,126.25 acre tract from Bradford B. Laidley, widower, William D. Laidley and Helen Laidley, his wife, and the Kanawha Valley Bank, N.A., Trustee. There was no mention of a right of way through the box culvert or a 15 foot right of way to the Kanawha River crossing the C. & O. Railway in the deed of acquisition dated September 22, 1977, and recorded in said Clerk's Office in Deed Book No. 1845, at page 290.

10. Bradford B. Laidley, Trustee, was a predecessor in title to George Lee Peal, the owner of the surface to the said 1,126.25 acres, and when Peal conveyed to The West Virginia Turnpike Commission the said box culvert was expressly dealt with in deed dated August 25, 1953, recorded in said Clerk's Office in Deed Book No. 1060, at page 200.

11. The 46.186 acres, which had as an appurtenance a 15 foot right of way crossing the C. & O. Railway to the Kanawha River "to be designated" is not a part of the Orlandi acreage either minerals or the surface which was acquired from the Peal family.

The right of way is not designated on the Holsclaw map attached to the deed recorded in Deed Book No. 420, at Page 301.

The 15 foot right of way was to afford a "crossing over the Chesapeake and Ohio Railway". There is no box culvert indicated on the Holsclaw map. The box culvert is located up river from the tract conveyed by Deed recorded in Deed Book No. 420, at page 301, and is not an appurtenance to the Orlandi interest upon which the box culvert was located.

CONCLUSIONS OF LAW

Based upon the foregoing findings of fact the Court makes the following conclusions of law:

1. There is no record evidence that the fifteen (15') foot right of way was ever established or designated.

2. That any right to the use of the box culvert enured solely to the benefit of George Lee Peal, the owner of the surface of 1,126.25 acres, more or less, who is not a party of this action.

3. The Petitioners did not acquire the right to the use of the box culvert through

predecessors in title.

4. The undesignated fifteen (15') foot right of way is not an appurtenance to surface or mineral interests owned by the Petitioners.

5. The Respondents did not take or damage any property rights of the Petitioners and accordingly the petition seeking the issuance of a writ of mandamus must be DENIED.

Accordingly, it is hereby ORDERED that the Petition of the Petitioners seeking the issuance of a writ of mandamus be and the same is hereby DENIED.

It is further ORDERED that this matter be and the same is hereby DISMISSED and STRICKEN from the docket of this Court. The Court notes the objection and exception of the party or parties aggrieved by the ruling of the Court.

The Clerk of this Court is hereby directed to send certified copies of this Order to all parties or counsel of record.

Dated: FEBRUARY 3, 1993 ENTER:

_____

HERMAN G. CANADY, JR.,
JUDGE

APPENDIX F

MR. CICCARELLO: And the map is in stipulation evidence #2.

Q 29 Now, on that map were you able to see where that right-of-way is?

A The right-of-way does not appear on this partition map.

Q 30 All right. From that partition map, did you go further into the property and the chain of title?

A Yes.

Q 31 Okay. What did you do next?

A From there I went to the next matter chronologically. It was in August 25, 1953, D-Book 10, 6200 in which a successor in title who I'll name as P-E-A-L conveyed to the turnpike a right-of-way for the West Virginia Turnpike. The language in that deed to the Turnpike was as follows and I would prefer to read that verbatim. "The parties of the first part for the benefit of themselves herein resigns reserves the right to use for the purpose

of the underpass as shown on map # 76, filed herewith together with so much of the land herein conveyed extending from the southerly outlook of said underpass of the property being conveyed insomuch of the land herein conveyed extending from the northerly outlook of said underpass to the old country road." Which is shown on said map and so on. There's a language appearing in the deed to the Turnpike subsequently in February 25, 1975, another conveyance from Peal to the West Virginia Department of Highways. No, I don't think that specifically refers to this. Let me proceed to the next day in question.
In May 10, 1977, D-Book, 1831 page 476, Bradford Laidley conveyed properties to Joseph Orlandi and I quote from that, "Together with the improvements thereinto belonging and the purposes belonging to and so so. Also, all

interests including especially but not limited to the right-of-way from the hill land of the Kanawha River as reserved in 420, 301.

Q 32 Okay. Now excuse me sir. Okay. Wait a minute and let me see if we can understand that Mr. Horan. There is in the deed from Laidley to Orlandi an existence ...

A Well, it's my formal name.

Q 46 Your formal name? Okay. Well, looking at the property itself by visual examination you indicated earlier you were interested - you indicated you were interested where Wilcox Branch was. Do you have a map that might help us in trying to locate for the Court the location of this right-of-way as it pertains to the map and Wilcox Branch?

A I have this map which the Court has in its hand right now. This is Wilcox Branch and this is the - this is Wilcox Branch and this is the - this is Wilcox Branch and

it's my opinion based on my title examination and visual examination of the property that the crossing is within a very few feet on the left-hand side or westerly side of Wilcox Branch. I saw a Branch ahead of me. I saw the six-foot culvert.

Q 47 Okay. Is there any question in your mind after examining the records, this map and the visual observation of the property that the right-of-way lies on this piece of property? What is that? (indicating on map)

A 267 acres of Mr. Orlandi.

Q 48 All right. Now the property that you referred to earlier in 401 -

A 420, 301.

Q 49 - 420, 301 except for the property south to give access from the southern property. Is that right?

A Yes, sir.

Q 50 Which property was conveyed in this particular deed?

A The properties which I just pointed out to the Court on the

partition of the map.

Q 51 Okay. Is the property to the south this particular property number? Two? I think it was lot # 2. Is that right?

A So designated on this map.

Q 52 Okay. It was lot #2?

A Yes.

Q 53 Say you would be talking about property south of lot #2 which has this lot attached to it to go to the river? Is that correct?

A That's correct. Mr. Ciccarello, in the deed it is referred to as erroneously I believe as lot # 21 but the acreage and a survey which I have here definitely identifies it as the property listed as #2 ...

A Yes, sir.

Q 22 And did you have any occasion to try and develop it in any way?

A Well, yes we've had some occasions. In fact it was a Princess Susan Coal Company that went up on the mountain and they

made twenty-three openings in the five block seam and discovered there was coal and they - their plans was that they asked me for a lease on the property with plans to bring a road off of the mountain and then through the box culvert to that river tipple that was there.

Q 23 Okay. Was - during the time that you were going up there up until the time that the four lane was built there, did you ever see that tunnel built used for any other purposes than for you going through there to get to your property.

A No. Just by lumber trucks.

Q 24 Was that Pack Lumber Company?

A Yeah, that was Pack Lumber Company. There was a road that come off and then hit the tunnel and then over to -

Q 25 Okay. But didn't there come a time when you couldn't use that box tunnel any more?

A Yes. I had been to Florida for

the winter, a part of the winter but anyway, when I come back - I think for Christmas - I noticed that there was no more box.

Q 26 What was there?

A Well, they put a pipe in there and filled it in. I had been to talk to the Department of Highway about this road that we had coming off the hill hoping that they would let it connect to the road that goes out of there now. I went down and talked to them and they never did say that they were going to close that tunnel.

Q 27 No one had ever told you that they were going to close that tunnel?

A No.

Q 28 Was it your understanding whether that tunnel was your right-of-way that we had through the property.

Q 29 And did you understand that you had been granted a right-of-way at some point in your deed?

A Yes. In the deed.

Q 30 Okay. So that when they filled it in or - you day a pipe. When you

say a pipe, what are you talking about?

A It's a 6 foot concrete culvert pipe that you use for the water of Wilcox Branch to run through under the turnpike.

Q 31 Could you go through it?

A Well, you could walk through it but you couldn't drive a truck through it or anything. You can't bring coal through there.

Q 32 Was there a curve or something through there that would keep you from putting a belt through there? When you saw that, you say nobody told you anything about it. Is that right?

A That's right.

Q 33 Had you ever been approached with anybody with the state department either Department of Highways or turnpike or anybody in reference to your right-of-way?

A No. Nobody. In fact in 1984, January of 1984 we went to the state house to talk to those people and all we got was denial

of everything. They even denied we had any rights in it or - and Tom encroached on me in three different places. They shot the rock from Wilcox Branch to Marmet, which is my mineral. They took I don't know many cubic yards and at the other end of the tunnel they bought some land from Peal and encroached me for a width of three or four feet, or five for a distance of 200 feet and never paid me for that. So they've stepped on me about three different places.

Q 34 Okay. All right. Now sir, is there - from the property where you own the minerals - is there any way for you now, you or anybody that might want to do so now on your property to get to the river directly from your property across the turnpike?

A No, sir.

Q 35 The turnpike goes all the way along it doesn't it sir?

A Yes.

Q 36 Now, there's a road over there isn't there? That's why it's called Clark Road or something like that. Isn't there?

A Yes, sir.

Q 37 Do I understand that the road wasn't there when you first bought the property?

A No.

Q 38 Have you ever been in the coal business yourself?

A All my life.

Q 39 You ever mined any coal yourself?

A Yes, sir. 27 years and started with a pick and shovel.

Q 40 And you're familiar with coal trucks?

A Yes, sir.

Q 41 Did you have coal trucks where you mined before?

A Yeah.

Q 42 Where was that? Up near Ashford>

A Yeah, up near Ashford.

Q 43 Okay. Now this road that's there now that wasn't there before, can you kind of describe a little bit for us?

A Well, it's a very narrow road. It's satisfactory for people that lives there. Of course houses are built right near the road. It's all right for a truck, a pickup truck or a car but you could never haul fifteen or twenty tons of coal up on it.

Q 44 Unless the distance - have you ever measured the distance from your property going on that road out to Lynn's Creek?

A Well, if you had to come up this Clark roadway it makes the haul about three miles longer to get to the river. If you could go through the turnpike, through the box culvert like we should have been, to the river it would have been a matter of a couple hundred feet, three or four hundred feet. But to come around the way - the way that they say we could come, it would be three miles or approximately three miles. Have you had any kind of an estimation from any truckers or anything like

that as to whether there would be any additional cost on that way than it would have been if you could have gone across the other way?

A Yeah, probably fifty cents additional cost.

Q 46 Fifty cents what?

A A ton, per ton. Yeah, per ton.

. . . would be no problem to go up, I estimate about 8 feet is what you had to go up in elevation in order to get over the railroad and that's no problem in 50 foot distance.

THE COURT; When you say "three main line", what are you talking about? Three separate individual railroad tracks running parallel?

A Well, there's really just one main line and then there's an alternate track and then there's a side track. But there's really only one main line up in there.

Q 8 Okay. But there are three parallel tracks right there.

A If you can get up to one you can get up to all of them.

Q 9 You were then suggesting you might build a tunnel under it or go over with the conveyor?

A No. I didn't suggest it. I said that the railroad says you could put - in facts it's provided that we have a right for crossings over the railroad, and then in writing a letter to the railroad they said that we can even, where it would be possible to go over the track with whatever you want as long as you had 23 foot clearance and it's possible to go under it providing that you do it to their regulations. Which, you know if you're going through the pipe, you have to go a pipe in a pipe. If you're going through a belt conveyor you have to have a box in a box. In other words, you get a leak in one the other one will catch it. But any way that's kind of railroad regulations.

Q 10 There was in existence a public

road #61 over to Clark Road or Clark Drive when the box culvert -

A Yes.

Q 11 And there's still in existence a public road 6102 Clark Drive?

MR. CICCARELLO: Excuse me, I didn't understand what you meant when you said Clark Road. On which side? Which side of the turnpike are you talking about?

A What is the question again?

Q 12 Are you familiar with the public road known as Clark Drive?

A Yes, sir.

Q 13 And where is that?

A The fifteen foot right-of-way relates to the tract of 161 acres acquired by Mr. Orlandi, which is Wilcox Branch or Bradford Hollow. This is down towards the Lynn's Creek side some two or three thousand feet from the box culvert. That fifteen foot right-of-way was never established.

Q 14 Have you an opinion concerning the location of the fifteen foot

floater with relation to the box culvert>

A Yes, sir. I do.

Q 15 And what is that opinion?

A The fifteen foot right-of-way was never established. That right was given to Bedford Land Company and that deed that you've got in evidence, that was never established. The twenty foot right-of-way which Mr. Orlandi acquired from the West Virginia Turnpike Commission in the 1956 deed was limited to only what the turnpike could grant, which was the limits of the act acquired right-of-way. The rest of that area was owned by Mr. Peal and continued to be owned by Mr. Peal so that the twenty foot right-of-way existed from the culvert to the edge of the turnpike right-of-way and it went no further because the turnpike commission had no further authority to grant any right-of-way up over or across Mr. Peal's land.

Q 16 So have you an opinion whether the fifteen foot right-of-way went through the box culvert?

A No, sir. It's two or three thousand feet down the river towards Lynn's Creek.

Q 17 What affect do the deeds to the turnpike have with relation to the access and the box culvert?

A Well, in the 1851 deed when the turnpike commission, not by way of condemnation but by a deed from Mr. Peal - the owner of all the surface lands including the box culvert - the deed to the turnpike commission expressed the reserve to the Peals the box culvert.

Q 18 And to no one else?

A To no one else because they held all the surface there.

Q 19 Did you find anything of a record whereby the Peals conveyed any interest to the Laidleys, to the Orlandis?

A I examined this title 130 years under Mr. Orlandi's lines, Mr. Peal's surface lands, everything

from Lynn's Creek to Field's Creek. There was never any transaction between Mr. Peal and Mr. Orlandi down from August 5, 1985 which was the date in my, and conclusion of any title examination. Nothing on record whatsoever between those two gentlemen.

Q 20 When I first asked you concerning a right-of-way in existence in the deed I did a poor job on describing the deed. Can you give me the accurate deed book and page book?

A The accurate deed book is 401230. The actual deed book is actual 420, page 301 dated September 8, 1936 to Bedford Land Company wherein this fifteen foot floater right-of-way is to be established by the grantee, Bedford Land Company. The grantee had the so power to designate it and this was never done.

Q 21 All right. Are you familiar with Bedford Land Company?

A Yes, sir.

Q 22 In what relation did you became familiar with them?

A Bedford Land Company was one of the twelve or thirteen companies owned by the Dickison family who were heavily involved in coal operations, active mines, leasing of coal, timber, oil and gas. I was their general counsel for a period of time in the 1960's and later represented them for many years after that. Bedford Land Company was one of the companies that I represented.

Q 23 Were you familiar with this land at that time?

A Yes, sir. We had detailed maps, files, systems on every right-of-way, the quality of coal in each seam going back to when the properties began to be acquired in the 1850's.

Q 24 Were you aware of any right-of-ways on those maps?

A No, sir because at the time, the time being early 1960's we, being

the Dickison owners, the Dickison family and Bedford Land Company being one of them considered this particular area to be rather worthless from the standpoint of coal operations. The timber had been mined out years before and new growth was coming upon which was not worth much, in 1960's anyway. But there was no right-of-way. I worked hand in hand with Mr. Clarence Polly and Mr. George Sovic who was later with the department of highways on everything including examinations of underground mines with Eastern Coal Company and a lot of other coal companies throughout the southern part of the state.

Q 25 And the land that Mr.Orlandi owns in fee, is there access?

A Yes, sir. Off Field's Creek through Braun through on Field's Creek laying out the streets and public highways which butt on his fee lands 800 acre tract.

Q 26 Is there any restriction on

manners which coal could be taken or could be restricted on the coal?

A Not on his feet tracts on the upper end towards Field's Creek. On the areas we're talking about in the box culvert he had only the deep mining rights and of course under a Supreme Court decision since 1946 he cannot auger on strip coal.

MR. BROWN: No further questions.

CROSS EXAMINATION BY MR. CICCARELLO:

Q 1 Mr. Santi, regardless - let me start at first. Regardless of whether there's any other access to Mr. Orlandi's property from some other way, if indeed he had a right-of-way ane that was somehow obstructed or taken by the State of West Virginia, he is entitled to be compensated for that isn't he?

A Well, I suppose if the right-of-way were your question as supposition, I'm going to give you

an answer based on supposition.

Q 2 Sure.

A Suppose that Mr. Orlandi had had a right-of-way which he used for ten years or more on the right of user then he would probably have under our common law a right to such right-of-way.

Q I'm not talking about a prescriptive right ...

Supreme Court, U.S.
FILED
FEB 25 1999
CLERK

No. 98-1192

In The

Supreme Court of the United States

October Term, 1998

JOSEPH ORLANDI, DEBORAH A. ORLANDI SIGNORELLI, KAREN ORLANDI PATERNO, MICHAEL E. ORLANDI and JOSEPH ORLANDI,

Petitioners,

v.

CHARLES MILLER, Commissioner of West Virginia Division of Highways and the West Virginia Turnpike Commissioner,

Respondent.

On Petition For Writ Of Certiorari To The West Virginia Supreme Court

BRIEF OF RESPONDENT IN OPPOSITION TO THE PETITION FOR WRIT OF CERTIORARI

JEFF MILLER
Counsel of Record
ANTHONY G. HALKIAS
Legal Division
West Virginia Division of Highways
Building 5, Room 519A
1900 Kanawha Boulevard, East
Charleston, WV 25305-0430
(304) 558-2823

Attorneys for Respondent

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

QUESTION PRESENTED FOR REVIEW

Whether the West Virginia Supreme Court erred in refusing Petitioners' appeal of a lower court decision holding that their real property suffered no compensable taking or damage, in violation of the Fifth Amendment of the United States Constitution.

TABLE OF CONTENTS

Page

QUESTION PRESENTED FOR REVIEW i

TABLE OF CONTENTS ii

TABLE OF CITED AUTHORITIES iii

STATEMENT OF THE CASE 1

A. Procedural background 1

B. Facts 2

SUMMARY OF THE ARGUMENT 6

REASONS FOR DENYING THE WRIT 7

CONCLUSION 13

APPENDIX – Text of Constitutional Provisions Involved ..... App. 1

TABLE OF AUTHORITIES

Page

CASES

Gardner v. Bailey, 128 W.Va. 331, 36 S.E.2d 215 (1945) 10

Heavener v. State Road Commission, 118 W.Va. 630, 191 S.E. 574 (1937) 10

Richmond v. Hinton, 117 W.Va. 223, 185 S.E. 411 (1936) 11

State ex rel. McCormick v. Miller, 171 W.Va. 42, 297 S.E.2d 448 (1982) 10, 11, 12

State ex rel. Teter v. State Road Commission, 152 W.Va. 805, 166 S.E.2d 757 (1969) 11, 12

State ex rel. Woods v. State Road Commission, 148 W.Va. 555, 136 S.E.2d 314 (1964) 10

CONSTITUTIONAL PROVISIONS INVOLVED

West Virginia Constitution, Article 3, § 9 10

PROCEDURAL RULES

Rules of the United States Supreme Court, Rule 10..... 13

STATEMENT OF THE CASE

PROCEEDINGS AND NATURE OF THE RULINGS IN THE CIRCUIT COURT OF KANAWHA COUNTY, WEST VIRGINIA

On May 19, 1984, Petitioners filed in the Circuit Court of Kanawha County, West Virginia a writ of mandamus to require the Appellees to institute eminent domain proceedings for the alleged taking of a 15 foot right of way that they claimed was an appurtenance to approximately 1,126 acres of mineral interests that they owned between Lens Creek and Fields Creek, Louden District, Kanawha County, West Virginia. The Circuit Court of Kanawha denied the writ. Petitioners appealed.

On November 23, 1994, the West Virginia Supreme Court remanded the case to the Kanawha County Circuit Court (Petition, Appendix C), directing the lower Court, after affording the parties a reasonable opportunity to be heard, to construe a 1956 deed from the Bradford Estate to the West Virginia Turnpike Commission and to determine whether this deed did, in fact, extinguish or transfer away the Bradford Estate's (15 foot) easement reserved in a 1936 deed. After making such construction, the Circuit Court was to rule whether the July 12, 1977 deed language purporting to transfer to Joseph Orlandi actually did transfer the easement reserved and excepted in the 1936 deed.

Upon remand, by Order entered March 20, 1998, the Kanawha County Circuit Court ruled " . . . that the petitioners' petition for writ of mandamus and request for setting this matter on the Court's docket for condemnation proceedings, on remand from the Supreme Court

of Appeals of West Virginia is hereby DENIED" (Petition, Appendix B).

On July 20, 1998 Petitioners again petitioned for appeal to the West Virginia Supreme Court, which denied the petition by Order entered September 24, 1998 (Petition, Appendix A). From this Order Petitioners herein appeal.

STATEMENT OF THE CASE AND THE FACTS

Petitioners seek a Writ of Mandamus requiring the Department of Transportation, Division of Highways to institute a proceeding in eminent domain to acquire their claimed interest in a 15 foot right of way reserved in favor of the Petitioners' predecessor in title in that certain deed from George S. Laidley, Administrator, to the Bedford Land Company, dated September 8, 1936, and recorded in the Office of the Clerk of the County Commission of Kanawha County, West Virginia, in Deed Book 420, at page 301.

HISTORY OF THE 15 FOOT RIGHT OF WAY

The 15 foot right of way was created in that certain deed, dated September 8, 1936, from George S. Laidley, Administrator, to Bedford Land Company, which deed is recorded in the aforesaid Clerk's office in Deed Book 420, at Page 301, wherein there was reserved a 15 foot right of way in the following language:

> Eighteenth: The grantors herein hereby reserve for the benefit of themselves, their heirs, devisees, grantees and assigns, a right of way fifteen (15) feet in width for a private road over and across the land hereby conveyed from Kanawha River to the land now owned by the grantors herein, lying back or south of the land hereby conveyed, as an appurtenance to said back land, the location of said fifteen foot right of way to be hereafter designated and fixed by the grantee herein, it's successors and assigns, which shall have the right to use said fifteen foot road in common with the grantors herein, their heirs, successors, devisees, grantees and assigns, including the right to cross and recross the same, but not in such manner as to impair, restrict or interfere with the full and free use thereof by the said grantors herein, their heirs, devisees, grantees, successors and assigns, and so as to afford a crossing over the Chesapeake & Ohio Railway.

This right of way next appeared in a deed dated April 7, 1951, between Bradford B. Laidley, Trustee, to Carl E. Peal and Dorothy Peal, husband and wife, recorded in the aforesaid Clerk's Office in Deed Book 954, at page 312. In this instrument the Grantor conveyed to the Grantees the 15 foot right of way in the exact same language as above set forth. This deed conveyed the surface only to the Grantees, reserving all oil, gas, coal and other minerals to the Grantor. The deed contained eight tracts of land which comprised some 1,126 acres, more or less.

The third appearance of the 15 foot right of way is in a deed, dated July 12, 1977, from Kanawha Valley Bank,

Successor Trustee, to Joseph Orlandi, predecessor in title to the present owners, and of record in the aforesaid Clerk's Office in Deed Book 1835, at Page 211. The right of way was conveyed in the following language:

> Together with appurtenances appertaining to the coal and the right to mine coal in and under the aforesaid eight tracts of land . . . ; including but not limited to, a right of ingress and egress in common with the party of the first part, its successors and assigns, from the hill land to the Kanawha River on that certain right of way reserved in the aforesaid deed from George S. Laidley, Administrator, with the will annexed of the estate of William A. Bradford, Jr., dated September 8, 1936 and of record in the Clerk's office in Deed Book 420, page 301.

In this deed the Grantor conveyed "all of its right title and interest in and to the coal and the right to mine coal". The deed contained eight tracts comprising 1,126 acres, more or less.

Intervening the deed from Bradford B. Laidley, Trustee, to Carl E. Peal and Dorothy Peal and the deed from Kanawha Valley Bank, Trustee, to Joseph Orlandi is the controlling deed to this issue. Bradley B. Laidley, Trustee, et al., conveyed 18.419 acres of coal, oil, gas, and other minerals to the West Virginia Turnpike Commission, by that certain deed dated April 6, 1956, and recorded in the aforesaid Clerk's office in Deed Book 1174, at page 111.

On page three of the aforesaid deed there are specific reservations and exceptions.

Page five of the said deed contains the following language of conveyance and release:

> Although it is recognized that the party of the second part may use, sell or otherwise dispose of all or any portion of the land hereby conveyed as if its intended use were not mentioned herein, it is understood by the parties of the first part that the said parcel of real estate is presently intended for use in connection with the construction, maintenance, operation and/or use of a non-access Turnpike, in furtherance of which, the parties of the first part, whether the owner of other remaining or other land adjoining said Turnpike, or of any interest therein or not, do hereby grant, convey, release and forgo unto the said party of the second part unless heretofore expressly reserved or excepted, all easements of way over, across, along, through, upon or under the lands hereby conveyed and all rights and easements of access to or egress from said lands and hereby releases the party of the second part, its successors and assigns, from any and all claims for damages or compensation of any nature whatsoever arising either directly or indirectly from the construction maintenance operation and use of the said Turnpike.

The West Virginia Supreme Court, in its November 23, 1994 decision, directed the Circuit Court of Kanawha County to construe this language.

SUMMARY OF THE ARGUMENT

In the 1956 deed the West Virginia Turnpike Commission expressly bought a controlled-access interest for the expansion of the West Virginia Turnpike for the purpose of upgrading the Turnpike to Interstate standards.

The grantor in the deed used the following language in its release and conveyance to the West Virginia Turnpike Commission of a controlled access interest:

> . . . in furtherance of which, the parties of the first part, whether the owner of other remaining or other land adjoining said Turnpike, or of any interest therein or not, do hereby grant, convey, release and forgo unto the said party of the second part unless heretofore expressly reserved or excepted, all easements of way over, across, along, through, upon or under the lands hereby conveyed and all rights and easements of access to or egress from said lands and hereby releases the party of the second part, its successors and assigns, from any and all claims for damages or compensation of any nature, whatsoever arising either directly or indirectly from the construction maintenance operation and use of the said Turnpike.

What was owned by the Laidley Trust in 1956 was the right to designate the location of a 15 foot right of way. The location of the right of way upon the ground was never established. This right to designate the location of the right of way was released by the language of release and conveyance contained in the deed between Kanawha Valley Bank, Trustee, to the West Virginia Turnpike Commission, as set forth above.

The phrase "unless expressly reserved or excepted" clearly refers to the present instrument. The deed began with a conveyance of the coal, oil, gas, and minerals to the Grantee, followed by expressed reservations and exceptions, and then by the language of release above set forth.

The West Virginia Supreme Court directed the Circuit Court of Kanawha County to construe the language of the deed and then determine if any interest in realty owned by the Petitioners was taken or damaged by the construction in the expansion of the West Virginia Turnpike.

That is exactly what the Circuit Court of Kanawha County did in its Order of March 20, 1998. Kanawha Valley Bank, Trustee, did not own the 15 foot right of way that it purported to convey to Orlandi. Thus, Orlandi acquired no title to the 15 foot right of way.

REASONS FOR DENYING THE WRIT

Petitioners' argument may be fairly summarized as follows:

1) that they owned a right of way through a reinforced concrete box culvert that was taken when the box culvert was replaced by a smaller drainage pipe when the West Virginia Turnpike was widened to four lanes; 2) that even if they did not own an easement through the box culvert, they owned other property interests that were damaged, though not taken, when vehicular access to the area was relocated; and, 3) that the Circuit Court of Kanawha County, West Virginia and the West Virginia Supreme

Court failed to apply the proper analysis by failing to recognize that Petitioners were entitled to compensation for damage to their property even if no property was taken. Because no property interest was taken, no showing was made of probable compensable damage to Petitioners' property, and because the Courts below correctly applied the law, the instant Petition should be denied.

Petitioners had no property interest that was directly taken. The Circuit Court on remand was directed to construe the 1956 deed from the Bradford Estate trustee to the Turnpike Commission to determine whether that deed extinguished or transferred away the Bradford Estate's 15′ easement reserved in the 1936 deed to the Bedford Land Company. The West Virginia Supreme Court, in its September 27, 1994 unpublished per curiam opinion, expressly observed that the pertinent language of the 1956 deed to the Turnpike Commission granting and conveying all rights and easements over and through the property conveyed – "unless heretofore expressly reserved or excepted" – was somewhat ambiguous and that it should be construed on remand (Petitioner's Appendix C, p. 23). This the Circuit Court did, stating in its opinion that "said language clearly indicates that such a reservation or exception would be indicated *in this deed*, but was not because the parties intended that a complete transfer of the property be completed so as to further the construction of the closed access Turnpike, as was indicated in the language of the deed" (Petitioner's Appendix B, p. 7. Emphasis added by Respondent). That Court had before it all maps and deeds introduced in the record, and also had the benefit of expert testimony concerning title

to the properties in question, as well as testimony from petitioner Joseph Orlandi.

Petitioners appear to rely more heavily on their argument that even if they cannot not show clear title to an easement running through the box culvert, they are entitled to compensation because the access to at least some of their various coal and surface properties in that area is not as direct and convenient as it was before the box culvert was replaced. "[A]ll that is needed to be established", they argue, "is that they had a property interest that the widening of the turnpike damaged or resulted in probable damage and that Petitioners can show a good faith argument for damages" (Petition, p. 18). To support this claim of damage, they offered the testimony of Petitioner Joseph Orlandi that using Clark Road, the public road that continues to access his property, to get to the river would be "about three miles longer" than a direct access from the closest part of his property through the box culvert to the river (Petition, Appendix F, p. 53). This lengthened access would, according to Mr. Orlandi, increase the cost of coal hauled by truck to the river by "about fifty cents" per ton (Petition, Appendix F, p. 54).

The Kanawha County Circuit Court, on remand, considered both the taking issue surrounding the 15′ easement and the issue of damage, concluding "that the petitioners have not been damaged by the actions of respondents and that a mandamus action should not lie against the respondents to proceed with condemnation hearings on this matter" (Petition, Appendix B, p. 8). This ruling is both consistent with the facts and applies the proper law.

> One who seeks relief by mandamus must show a clear legal right to the relief which he seeks. A landowner who seeks by mandamus to compel the state road commission, or state road commissioner, to institute proceedings in eminent domain to determine just compensation for land which he alleges has been taken or damaged for state highways purposes must establish that the highway construction has resulted in probable damage to his property *of such nature that compensation therefore may be properly ascertained in an Eminent Domain proceeding.*

(emphasis added). Syllabus by the Court No. 4, *State ex rel. Woods v. State Road Commission*, 148 W.Va. 555, 136 S.E.2d 314 (1964). West Virginia Courts, in considering what damages to property are compensable in eminent domain, have stated that "[n]ot every damage to real estate is compensable. It is common knowledge that in the relocation of our highways property of many persons is left in situations less advantageous to the owners." *Gardner v. Bailey*, 128 W.Va. 331, 36 S.E.2d 215, 218 (1945). See also *Heavener v. State Road Commission*, 118 W.Va. 630, 191 S.E. 574 (1937).

Like other landowners in the area, the Petitioners still have access to their property along relocated County Route 61/2, a public road in the state road system.

> The Constitution [W.Va. Const. Art. 3, § 9] does not undertake to guarantee to a property owner the public maintenance of the most convenient access to his door. The law will not permit him to be cut off from the public thoroughfares, but he must content himself with such direct route for outlet as the regularly constituted public

> authority may deem most compatible with the public welfare.

Richmond v. Hinton, 117 W.Va. 223, 185 S.E. 411, 412 (1936).

Petitioners argue that "it is abundantly clear that all of the lower Court decisions (West Virginia Supreme Court and Kanawha County Circuit Court) did not apply the proper analysis" (Petition, p. 18). However, they cannot plausibly suggest that the lower courts failed to recognize the general principle that compensation can be due for damage to property even where there is no taking, as this principle comprises the sole syllabus point of the West Virginia Supreme Court's November 23, 1994 decision remanding the case to the Circuit Court (Petition, Appendix C, p. 12). Petitioners quote from the case *State ex rel. McCormick v. Miller*, 171 W.Va. 42, 297 S.E.2d 448, (1982), citing *State ex rel. Teter v. State Road Commission*, 152 W.Va. 805, 809, 166 S.E.2d 757, 760 (1969) for the proposition that "[w]here the evidence is conflicting, but there is reason to believe that the construction of a road by the respondents could have caused damage to the petitioners' land, *and the evidence indicates that there was probable damage*, a writ of mandamus will require institution of eminent domain proceedings in order to have the jury determine such issues" (emphasis added by Respondent) *McCormick*, S.E.2d at 450 (Petition, p. 19). The full quotation from the *Teter* opinion, correctly supplied by the *McCormick* Court, begins "In cases of this kind. . . . " *McCormick*, S.E.2d at 450. The *McCormick* Court goes on to explain just what "cases of this kind" are: "The problems and facts in the case before us are analogous to those in *Teter*. The issue is whether the Department of Highways

altered the natural flow of water and whether that diversion damaged the appellants' property" *Id*. In short, both *McCormick* and *Teter* dealt with drainage, an issue playing no part in the instant case.

More significantly, however, even if one applies this principle of law to the instant case, the Kanawha County Circuit Court found that there was no damage to Petitioners' property. Petitioners insist that "[w]hether damages have occurred to the Petitioners is not relevant at this initial stage", (Petition, p. 21) and that "it was improper for the Court to conclude that there were no damages and to not order condemnation based thereon. All that had to be established was probable damage" (Petition, p. 22). Yet the very language cited by Petitioners in the *McCormick* and *Teter* cases suggests it is proper for the Court to consider whether evidence supports probable damages that are compensable in eminent domain, and not merely fanciful, speculative or non-compensable damages. There cannot be probable compensable damages if there are no compensable damages at all.

The Circuit Court of Kanawha County properly construed the 1956 deed, as it was directed to do on remand from the West Virginia Supreme Court, and found that no 15′ easement survived that conveyance that later passed to the Petitioners. It also correctly found that no compensable damage resulted to the Petitioners' lands by virtue of the acts of the Respondents. Accordingly, the decision of the West Virginia Supreme Court denying Petitioners' petition for appeal to that Court was proper.

Moreover, neither court below has "decided an important federal question in a way that conflicts with the decision of another state court of last resort or of a United States court of appeals", nor has either "decided an important question of federal law which has not been, but should be, settled by this Court", or "decided an important federal question in a way that conflicts with relevant decisions of this Court". *Rules of the United States Supreme Court*, Rule 10.

CONCLUSION

For the forgoing reasons Respondent, the West Virginia Commissioner of Highways, prays that this Court DENY THE WRIT.

Respectfully submitted,

JEFF MILLER
(*Counsel of record*)
ANTHONY G. HALKIAS
W. Va. Division of Highways
Room A519, Building Five
1900 Kanawha Boulevard, East
Charleston, West Virginia
25305-0430
Telephone No. (304) 558-2823

Attorneys for Respondent

APPENDIX – TEXT OF WEST VIRGINIA CONSTITUTIONAL PROVISION INVOLVED

ARTICLE 3, § 9 – PRIVATE PROPERTY, HOW TAKEN:

Private property shall not be taken or damaged for public use, without just compensation; nor shall the same be taken by any company, incorporated for the purpose of internal improvement, until just compensation shall have been paid, or secured to be paid, to the owner; and when private property shall be taken, or damaged, for public use, or for the use of such corporation, the compensation to the owner shall be ascertained in such manner, as may be prescribed by general law; provided that when required by either of the parties, such compensation shall be ascertained by an impartial jury of twelve freeholders.